United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

w/affidavit

75-6013

To be argued by
FREDERICK P. SCHAFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6013, 75-6053

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

—v.—

LEONE BOSURGI and EMILIO BOSURGI, As Executors of the Estate of ADRIANA BOSURGI, Deceased, CHEMICAL BANK, As Statutory Executor of the Estate of ADRIANA BOSURGI, Deceased, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and BENEDICT GINSBERG,
Defendants-Appellees,

—and—

Estate of ADRIANA BOSURGI, Deceased, and W. SANDERSON & SONS,
Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

—and—

CHEMICAL BANK, *Third-Party Plaintiff,*

—against—

LEONE BOSURGI and EMILIO BOSURGI, Individually, As Executors of the Estate of ADRIANA BOSURGI, Deceased, As Trustees of a Trust for the Benefit of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, As Agents of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES and As Agents of W. SANDERSON & SONS, Estate of ADRIANA BOSURGI, Deceased, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,
Third-Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLANT

DAVID P. LAND,
FREDERICK P. SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for the United States of America, Plaintiff-Appellant.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6013

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

LEONE BOSURGI, *et al.*,
Defendants-Appellees.

BRIEF FOR THE PLAINTIFF-APPELLANT UNITED STATES OF AMERICA

Issues Presented

1. Does the undisputed documentary evidence establish that SAICI has no valid claim of ownership to Adriana Bosurgi's securities account or the $215,000 proceeds thereof?

2. Does the fact that special income tax benefits were conferred upon Adriana Bosurgi because of her representations that she owned the securities account estop SAICI, who claimed to be in privity with Adriana Bosurgi, from asserting that she did not own that account?

3. Did the Court below err in granting SAICI's motion for summary judgment that it owned the securities account and the $215,000 fund when (1) there were

contested factual issues as to SAICI's claim, (2) SAICI produced no probative evidence of its claim, and (3) the Court below stayed the United States from taking discovery of SAICI?

4. Did the Court below err in giving considerable weight to the uncontested factual finding by the state court when (1) the state court proceedings were void for lack of jurisdiction, (2) there was evidence that the state court proceedings were collusive against the United States, and (3) the United States was not a party to the state court proceedings?

Statement of the Case

A. Nature of the Action, Orders Appealed, and the Central Factual Dispute:

On March 2, 1971 the United States commenced an action in the United States District Court for the Southern District of New York to recover a judgment for $666,780.72 against the defendants Chemical Bank, Leone Bosurgi, and Emilio Bosurgi in respect to assessed and unpaid federal estate taxes due from the estate of Adriana Bosurgi, deceased (A. 9-13).* The United States asserted that Chemical Bank and Leone and Emilio Bosurgi were liable for the taxes as statutory executors and transferees of Adriana Bosurgi's estate. The United States also sought to foreclose its tax claim against a $215,000 fund which the defendant Chemical Bank previously agreed to pay to the defendants Leone and Emilio Bosurgi.

The United States appeals (A. 492-493, 497-498) from the February 25, 1975 order and decision (A. 479-491)

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* Numerical references preceded by the letter "A" are to pages in the appendix filed by the United States.

and the June 4, 1975 order and judgment (A. 494-496) of the United States District Court for the Southern District of New York (Honorable Kevin Thomas Duffy) dismissing the action on contested cross-motions for summary judgment. The United States also appeals from (1) the prior November 15, 1973 order of the District Court (Honorable Kevin Thomas Duffy) staying the United States from proceeding with any deposition and document discovery of defendant Benedict Ginsberg, Esq. ("Ginsberg") (A. 197) and (2) the prior December 14, 1973 order of the District Court (Honorable Kevin Thomas Duffy) staying the United States from proceeding with any deposition and document discovery of Sociedad Anonima de Inversiones Comerciales e Industriales ("SAICI") (A. 198-199). Both Ginsberg and SAICI subsequently moved for and prevailed upon their motions for summary judgment resulting in the dismissal of the action.

The gravamen of the action, which is not disputed, is as follows: Adriana Bosurgi, an Italian citizen and nonresident alien of the United States, died on March 27, 1963. At the time of her death, she was the registered owner of a custodian account maintained at the Chemical Bank in New York City, which account was funded with corporate securities having a value of about $1,000,000. As set forth on pages 7-8, *infra*, the ownership of this property at the date of death gave rise to an estate tax liability. Subsequently, this account was transferred to her two sons, Leone and Emilio Bosurgi, also Italian citizens and nonresident aliens of the United States. As set forth on pages 7-8, *infra*, the transfer of the account gave rise to the tax claims against Chemical Bank and the Bosurgi brothers. In 1966, the Bosurgi brothers commenced an action against Chemical Bank in the Supreme Court, New York County, seeking a money judgment in excess of $1,000,000 based upon alleged mismanagement of the account by Chemical Bank which reduced its value to zero. That action was tentatively settled in 1970 upon

Chemical Bank's promise to pay $215,000 to the Bosurgis. It was this $215,000 fund which the United States sought to foreclose upon to satisfy the estate tax claim against the estate of Adriana Bosurgi, the Bosurgi brothers and Chemical Bank.

The central factual dispute was whether the Chemical Bank securities account was owned by Adriana Bosurgi on the March 27, 1963 date of her death. If the account was not owned by her, no estate taxes would be due. This factual issue was raised not by the Bosurgi brothers, who have refused to appear in this action, nor by Chemical Bank, but by SAICI. SAICI claims that it owned the Chemical Bank securities account and that Adriana Bosurgi and her two sons held the account as trustees and in fiduciary administration for SAICI. The United States sought discovery from SAICI as to its claim (A. 147-148), but Judge Duffy stayed discovery (A. 198-199). SAICI then moved for summary judgment to dismiss the complaint on the ground that it owned the account (A. 216-217). The United States opposed SAICI's motion and also moved for summary judgment to dismiss SAICI's claim (A. 284-285). Judge Duffy granted SAICI's motion, denied the United States' motion, and dismissed the action (A. 479-491, 494-496). On this appeal the United States seeks a reversal granting its motion for summary judgment against SAICI, or in the alternative, a remand and an order vacating the stay against discovery.

Ginsberg was the attorney for the Bosurgi brothers in their state court action against Chemical Bank. He asserts a lien priority superior to the tax claim to the $215,000 fund by reason of the services he rendered to the Bosurgis. The United States does not contest the lien priority of Ginsberg, but only the amount thereof. The United States sought discovery from Ginsberg to ascertain the reasonable amount to be allowed to him (A. 145-146), but Judge Duffy

stayed discovery (A. 197).* Ginsberg then moved for summary judgment for the amount of his asserted claim (A. 264-265) and the United States opposed (A. 336). Judge Duffy did not pass upon his claim, but granted his motion (A. 479-491, 494-496). On this appeal, the United States seeks a remand as to the Ginsberg fee issue and an order vacating the stay against discovery.

We shall trace the history of this action in its chronological order.

B. The Bosurgis' State Court Action Against Chemical Bank and the Creation of the $215,000 Fund:

In 1966, an action was commenced in the Supreme Court, New York County, styled *Leone Bosurgi and Emilio Bosurgi* v. *Chemical Bank New York Trust Company*, Index No. 7939/66. Ginsberg was the attorney for the Bosurgis. The complaint (A. 431-447), verified by Ginsberg on May 10, 1966 (A. 447), set forth six causes of action against Chemical Bank and sought damages in excess of $1,000,000. The complaint alleged that "plaintiffs were depositors in, and maintained accounts with" Chemical Bank (A. 431), that Chemical Bank was "trustee of the plaintiffs' property" and "had in its possession, among other securities owned by the plaintiffs" various corporate securities (A. 431), and that through mismanagement of plaintiffs' property Chemical Bank had damaged the plaintiffs. The verified complaint made crystal clear that the property involved was "plaintiffs' property" and "owned by the plaintiffs." There was not one hint by the Bosurgi brothers that the property involved did not

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* Pursuant to the applicable statute, 26 U.S.C. § 6323(b)(8), an attorney has a lien priority superior to a tax claim in respect to property subject to the tax claim, but only to the extent of the attorney's "reasonable compensation."

belong to them; and as far as we know, throughout that litigation the parties agreed that the property involved belonged to the Bosurgis.

That action was tentatively settled on September 15, 1970 upon Chemical Bank's promise to pay $215,000 to the Bosurgis pursuant to an oral agreement spread on the record before Mr. Justice Kapelman (A. 448-452). The oral agreement provided that the $215,000 was to be paid to Benedict Ginsberg, attorney for the plaintiffs, and held by him in escrow pending determination of tax claims asserted by the Internal Revenue Service (A. 449). The oral agreement also provided that the parties shall agree on a "formal written stipulation" which shall embody all of the terms orally agreed upon (A. 451). The United States was not present at that September 15, 1970 hearing nor did it take part in any aspect of the proceedings. The Internal Revenue Service had apparently notified Chemical Bank of the potential estate tax claim against it and the Bosurgi brothers. For that reason, Chemical Bank desired to guarantee that the $215,000 settlement fund would be available for satisfaction of the Internal Revenue Service's tax claim. Although the parties agreed to execute a formal written stipulation, no written stipulation was ever effectuated and Chemical Bank did not pay the $215,000 to Ginsberg.

C. The Commencement of the Tax Collection Action In The District Court, the Basis of Liability, and the *In Rem* Jurisdiction Over the $215,000 Fund:

The United States commenced its tax collection action in the District Court on March 2, 1971 upon the filing of a complaint (A. 9-14). Judgment was sought against Chemical Bank, Leone Bosurgi and Emilio Bosurgi for $667,780.72 consisting of $403,988.78 in assessed estate taxes, $161,794.74 in assessed interest, and $100,997.20 in assessed penalties. The United States also sought to foreclose its

claim on the $215,000 cash fund which Chemical Bank previously agreed to pay to the Bosurgis.

Jurisdiction in the District Court was based upon Section 7403.* Section 7403(a) provides that the United States may bring a civil action in the federal district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property . . . of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." Section 7403(b) provides that "all persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." Section 7403 (c) provides that the "court shall . . . proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property. . . ." There was no dispute that the Court below had jurisdiction of the action and the power to resolve the merits of all claims presented to it.

Also, there was no dispute as to the statutory basis for liability of the defendants. Section 2101(a) imposes an estate tax on the "transfer of the taxable estate" of every "decedent nonresident not a citizen of the United States." The taxable estate is that part of gross estate, less deductions, "situated in the United States." Section 2106(a). Securities issued by domestic corporations "owned and held" by a nonresident alien "shall be deemed property within the United States." Section 2104(a). Thus, if all or a part of the Chemical Bank account was owned by Adriana Bosurgi at the time of her death, estate taxes were due and payable. Section 2002 provides that estate taxes "shall be paid by the executor." If there is no executor or administrator acting within the United States, and

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* Section references, unless otherwise indicated, are to the Internal Revenue Code of 1954, 26 U.S.C., which follows the same section designations.

to our knowledge there was none, then the "executor" is "any person in actual or constructive possession of any property of the decedent." Section 2203. Chemical Bank was in possession of the account, and it was transferred to Leone and Emilio Bosurgi. Thus, all three are separately liable for the unpaid estate taxes as statutory executors. In addition, because Leone and Emilio received assets of the decedent, they may be liable for the unpaid estate taxes as "transferees" pursuant to Section 6901(a)(1)(A)(ii). As can be seen from the above, however, the estate tax liability hinges on the factual issue of who owned the securities account at the date of Adriana Bosurgi's death, and that factual issue was resolved against the United States by the Court below on cross-motions for summary judgment.

On March 2, 1971, the date the complaint was filed, and prior to the time Chemical Bank paid the $215,000 fund to the Bosurgis, the Court below (Honorable Marvin E. Frankel) entered an *ex parte* order (A. 15-16) restraining Chemical Bank from transferring to any person the $215,000 fund and restraining "Leone Bosurgi and Emilio Bosurgi, their attorneys, agents, employees, or others associated with them . . . from transferring to any person or from themselves from the jurisdiction of this Court any amounts received in the settlement [of the Bosurgis' action against Chemical Bank]" (A. 16). The United States' application for a preliminary injunction for a continuation of the relief granted in the restraining order was returnable on March 9, 1971 before the Honorable Dudley B. Bonsal. Appearances were made by the United States, Chemical Bank, and Ginsberg, but Ginsberg did not appear for any party. Judge Bonsal ruled that the restraining order remain in effect except that Chemical Bank should deliver the $215,000 to Ginsberg to hold in escrow pending determination of the tax claim. Judge Bonsal's endorsement of March 9, 1971 read: "Motion [by the United States] denied following argument. Settle order on notice in accordance with the Court's ruling" (A. 17).

The United States submitted a proposed order which was entered on March 18, 1971 (A. 32-34). The order directed Chemical Bank to deliver to Ginsberg the $215,000 fund for investment in certificates of deposit to "have and hold . . . in escrow subject to and impressed with any and all liens of the United States of America, and subject to further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to said $215,000" (A. 34). Thus, there can be no dispute that the federal court obtained jurisdiction over the $215,000 fund, appointed Ginsberg an officer of the federal court solely for investment purposes, restrained transfer of the $215,000 from the jurisdiction of the federal court, and directed that upon further order of the federal court the rights of the United States and other claimants to the $215,000 fund shall be determined.

Chemical Bank applied to Judge Bonsal for reconsideration of his March 18, 1971 order apparently because of the uncertainty of Ginsberg's capacity. In response to the Court's March 9, 1971 order, Ginsberg had submitted a proposed order (A. 35-36) and an affidavit dated March 18, 1971 (A. 29-31). That affidavit stated in relevant part: "I was counsel for the Bosurgi brothers in the state court action, I was not authorized to appear for them in the present action, and that it was my belief that Messrs. Kostelanetz and Ritholz would be appearing in the action in due course on behalf of the Bosurgi brothers" (A. 30). Thus, Ginsberg made clear that he was not appearing for the Bosurgis in this action and that his appearance was solely as an officer of the federal court to hold and invest funds for the federal court for the benefit of all the parties to the federal court action. Ginsberg's proposed order (A. 36), which was not signed by Judge Bonsal, stated:

> "Ordered, that the parties in an action in the Supreme Court [Bosurgi v. Chemical Bank], may take such proceedings therein as may be appropriate

> under the terms of the stipulation dated September 15, 1970 (A. 448-452), except that the proceeds of said settlement shall not be disbursed without further order of this Court."

Thus, the rejection of Ginsberg's proposed order made clear that the Bosurgis and Chemical Bank were not to take any further state court proceedings as to the $215,000 settlement fund.

Chemical Bank appealed Judge Bonsal's March 18, 1971 order (A. 39), which order was affirmed by this Court on April 21, 1971 (A. 44). The $215,000 fund was delivered by Chemical Bank to Ginsberg who has invested the funds in certificates of deposit. In respect to that appeal, the United States submitted an affidavit (A. 40-43) in which the United States stated that it had no objection to the March 18, 1971 order because such order subjected the $215,000 fund to the federal court's jurisdiction and protected the interests of the United States.

D. Ginsberg's Capacity As Agent for the Bosurgis In the Federal Court Action:

Chemical Bank filed an answer, counterclaim and cross-claims dated March 12, 1971 (A. 18-28). It added the Estate of Adriana Bosurgi, deceased, and Ginsberg as defendants. Ginsberg was joined a defendant because, as alleged by Chemical Bank (¶ 20), he "claims a right to receive $78,491.32 as attorney's fees in connection with his representation of" the Bosurgis in the state court action (A. 22). As against the Bosurgi brothers, Chemical Bank alleged (¶ 23-26) that they gained and exercised control over the assets previously held in the account in Adriana Bosurgi's name without having paid federal estate taxes; and that in the event judgment is rendered against Chemical Bank, it should have judgment against them (A. 24-25). Chemical Bank also alleged (¶ 18) that the Bosurgi brothers "in their individual capacities claim that they are the rightful owners" of the $215,000 fund (A. 22).

Ginsberg refused to accept service of Chemical Bank's pleading on behalf of the Bosurgi brothers. On April 22, 1971, one day after Judge Bonsal's March 18, 1971 order was affirmed by this Court, Ginsberg moved to vacate and set aside "the purported service of the Summons and Third-party complaint of the defendant Chemical Bank upon the Third-Party Defendants Leone Bosurgi and Emilio Bosurgi, on the ground that the said service was made upon a person not authorized to accept service on behalf of the Third-Party Defendants" (A. 58-59). Ginsberg's motion was denied pursuant to the opinion and order of the Honorable Morris E. Lasker filed on November 11, 1971 (A. 64-67). Judge Lasker found that the September 15, 1970 oral agreement between the Bosurgis and Chemical Bank (A. 448-452), contemplated a further written stipulation which was never executed, and therefore the state court action was still "pending" for the purpose of Ginsberg being the agent to accept service of process for the Bosurgis in the federal court action.

On May 11, 1971 Chemical Bank served and filed an amended answer, counterclaim and cross-claims asserting additional claims against the Bosurgis (A. 45-57). Although Ginsberg had also refused to accept service of the United States' complaint on behalf of the Bosurgi brothers, proof of substituted service by mailing copies of the summons and complaint to their Italian address was filed with the Court on June 10, 1971 (A. 68-69).

E. The Appearance of SAICI In the State Court:

At this time, the posture of the federal court action was as follows: Ginsberg had been appointed the federal custodian of the $215,000 fund solely for investment purposes, and the Court below had directed that it would resolve the merits of all claims to the fund (A. 33-34). Chemical Bank had appeared, filed a demand for jury trial (A. 37-38), and asserted claims against the Bosurgis. Ginsberg represented that he had no authority to represent

the Bosurgis (A. 30), and he moved to dismiss service of Chemical Bank's third-party complaint which was served on him (A. 58-59). The Bosurgi brothers had represented in their state court action that the Chemical Bank account belonged to them (A. 431); and in this action Chemical Bank represented that, to its knowledge, the securities account was owned by Adriana Bosurgi at the time of her death and subsequently transferred to the Bosurgi brothers (A. 19, 23-24).

On June 2, 1971 SAICI's counsel wrote a letter to Ginsberg (A. 386-387). That letter enclosed a copy of a complaint with annexed exhibits (A. 386, 393-402) in which SAICI sued the Bosurgi brothers and Ginsberg. The object of that action was to recover the $215,000 fund in Ginsberg's possession because SAICI claimed that it owned the fund. The June 2, 1971 letter stated that "no beneficial purpose can be served by commencing the action through attachment [of the $215,000 fund subject to the jurisdiction of the federal court]" (A. 387), and that "[a]uthority on your part to accept service of the summons and complaint and a simple stipulation between us governing the disposition of the funds in escrow . . . can effectively serve everyone's purpose . . ." (A. 387).*

The enclosed complaint (A. 393-398) fixed venue in the Supreme Court, New York County, the plaintiff was SAICI, and the defendants were the Bosurgi brothers and Ginsberg. The complaint alleged that SAICI was a Uruguayan holding company (¶ 1), that the Bosurgi brothers are Italian citizens and residents (¶ 2), that Adriana Bosurgi, who died on March 27, 1963, was the Bosurgi brothers' mother and also an Italian citizen and resident (¶ 3), that W. Sanderson & Sons, an Italian corporation, determined to establish a business and plant in Argentina

* To our knowledge, no stipulation, simple or otherwise, was executed by SAICI and Ginsberg seeking to subject the $215,000 fund to the state court's jurisdiction.

to produce and sell citrus by-products (¶ 5-6), that that SAICI "agreed to and did provide and advance large sums of money" to Sanderson for the erection of its plant (¶ 7), that Sanderson agreed with SAICI that the funds advanced by SAICI to Sanderson would be repaid through the deposit of moneys in a New York bank for SAICI's benefit (¶ 8), that to carry out this arrangement "on or about December 10, 1954, an agreement was entered into" among SAICI, Adriana Bosurgi, and the Bosurgi brothers (¶ 9), that Chemical Bank was the designated depository of SAICI's funds (¶ 10), that the Chemical Bank account was maintained in the Bosurgis' names (¶ 11), that deposits were made into the account (¶ 12), that the $215,000 fund held by Ginsberg "constitutes the property of [SAICI] by virtue of the aforesaid trust agreement" (¶ 17), and that the Bosurgi brothers "have no interest in said fund other than as former trustees thereof for and on behalf of [SAICI]" (¶ 18). SAICI sought judgment that the $215,000 belonged to it and that Ginsberg be directed to pay the $215,000 to it.

The most remarkable aspects of this complaint was that venue was laid in the Supreme Court, New York County, and that the United States was not named a party. The complaint admitted that Ginsberg is in possession of the $215,000 fund, and Ginsberg had obtained such possession pursuant to Judge Bonsal's March 18, 1971 order (A. 33-34). SAICI thus knew of the pending federal action, knew that the United States sought to foreclose its tax claim against the $215,000 fund, knew that the federal court had jurisdiction over the fund, and knew that the March 18, 1971 order provided that the federal court would determine the merits of *all* claims to the fund. In fact, Section 7403(b) provides that all persons claiming any interest in the property sought to be foreclosed upon to satisfy a tax claim *shall* be made parties. SAICI clearly should and could have intervened in the federal court rather than commencing an action in the state court. In

fact, SAICI's June 2, 1971 letter recognized that the state court did not have jurisdiction over the $215,000 fund which SAICI sought to recover, and that the letter sought to obtain *in rem* jurisdiction by attachment or a "simple stipulation" (A. 387). It was unclear why SAICI laid venue in the state court or why it failed to name the United States as a defendant. It was also unclear how SAICI intended to acquire jurisdiction over the Bosurgi brothers. SAICI's June 2, 1971 letter to Ginsberg (A. 386-387) asked him to appear for the Bosurgis even though Ginsberg had represented to the federal court that he had no authority to represent the Bosurgis (A. 30) and had made a motion to vacate service on him as agent for the Bosurgis (A. 58-59).

On June 10, 1971, eight days after SAICI's letter to Ginsberg, Ginsberg wrote a letter to Mr. Justice Kapelman (A. 355). The letter pointed out that the federal action had been commenced and it enclosed a copy of the March 18, 1971 order. Ginsberg stated that SAICI had commenced an action against the Bosurgis and him. However, he stated that "I have not yet received authority to appear for my clients [the Bosurgi brothers] in the S.A.I.C.I. case, but I would like to have my fees fixed and paid" (A. 356). The reference to Ginsberg's fees was apparently his claim for an attorney's fee which was set forth in paragraph 20 of Chemical Bank's March 12, 1971 answer, cross-claim and counterclaim (A. 22) To our knowledge, there was no action or proceeding pending in the state court in which Ginsberg sought to recover fees, and it appears that his fee question was properly before the federal court.* Ginsberg closed by requesting a hearing before Mr. Justice Kapelman for him to act as "arbitrator" to fix Ginsberg's fee.

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*Pursuant to Section 7403(b) all persons having claims to the property involved in a tax foreclosure suit shall be made parties to the federal court action, and Ginsberg was made a party defendant in the federal action because of his lien claim [A. 72, 76, 78].

A conference was held before Mr. Justice Kapelman on June 23, 1971, and the Assistant United States Attorney then in charge of the Government's federal court action was present as a courtesy to Mr. Justice Kapelman, who we have been informed, requested the Assistant's appearance. As a result of that conference, SAICI's counsel on June 24, 1971 wrote a letter to Ginsberg (A. 386-391). The letter pointed out that on June 16, 1971 a copy of SAICI's complaint was mailed to the United States Attorney's office (A. 387), that SAICI took the position that only Mr. Justice Kapelman could decide the issue of SAICI's asserted title to the $215,000 fund (A. 389), and "if the issue as to title is resolved in [SAICI's] favor it will dispose of the tax claim asserted by the Government against the Bosurgis" (A. 390).* Thus, SAICI knew that the purported effect of its lawsuit against the Bosurgis, if successful, would be inconsistent with the tax claim against the Bosurgis.

F. The Bosurgis' Appearance In SAICI's State Court Action And Their Denial of *SAICI's Claim:*

As of June 10, 1971, Ginsberg represented to Mr. Justice Kapelman that he had no authority to appear for the Bosurgis in SAICI's state court action (A. 356), a position consistent with his representations before the federal court (A. 30). However, pursuant to an answer verified on July 14, 1971 (three weeks after the conference before Mr. Justice Kapelman), Ginsberg appeared in SAICI's action on behalf of himself and the Bosurgi brothers (A. 409-411).

We must, of necessity, assume that Ginsberg would not appear for the Bosurgis unless he had received specific

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* It would appear that a person in SAICI's position would be disinterested in the tax claim against the Bosurgis; but as subsequent events show, the primary object of SAICI's action was to defeat the tax claim.

authority from them to do so. Also, we must, of necessity, assume that before answering the complaint for the Bosurgis, Ginsberg communicated with them as to the specific allegations and the annexed exhibits. The answer of the Bosurgis (A. 409-411) requires analysis because of the subsequent proceedings. The Bosurgis admitted that they have a residence in Italy, that Adriana Bosurgi was their mother who died on March 27, 1963, and that W. Sanderson & Sons is an Italian corporation* which determined to establish a citrus plant in Argentina. The Bosurgis denied knowledge or information sufficient to form a belief as to the truth of whether SAICI was a Uruguayan holding company, whether SAICI advanced funds to Sanderson, whether the Bosurgis had entered into an agreement with SAICI,** whether Chemical Bank was the depository of SAICI's funds, whether the Chemical Bank account maintained in their names was the account holding SAICI's property and whether deposits were made into the account for SAICI's benefit. Finally, they denied, without qualification, "each and every allegation contained in paragraph '17' and '18' of the complaint, except that such denial by the defendant Ginsberg is on information and belief" (A. 410). The denied paragraph 17 alleged that the $215,000 "constitutes the property of" SAICI (A. 397). The denied paragraph 18 alleged that the Bosurgi brothers "have no interest in said fund other than as former trustees" of

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* In Point I, *infra*, p. 32, it is pointed out that SAICI and the Bosurgis were the majority stockholders of Sanderson.

** The allegations of paragraph 9 of the complaint (A. 395), of which the Bosurgis denied knowledge, set forth the existence of a written agreement by them dated December 10, 1954 (A. 400-402). That purported agreement was annexed as an exhibit to the complaint, and it purported to contain the signatures of the Bosurgi brothers. From their answer, it must be assumed that they were confronted with the agreement bearing their purported signatures, and that they told Ginsberg they knew nothing about it.

SAICI (A. 397). Thus, by these denials, sworn to by Ginsberg as based upon information communicated to him (A. 411), the Bosurgis contested the central factual allegations of SAICI, *i.e.*, that it owned the fund and that the Bosurgis had no interest in it.

No affirmative defenses were pleaded. As will be pointed out in Point IV, *infra*, one obvious defense that defendant Ginsberg should have asserted as the federally appointed custodian of the $215,000 fund was lack of subject matter jurisdiction.

SAICI had previously made known to Ginsberg that if SAICI prevailed, then the tax claim against the Bosurgis would fail (A. 390). The Bosurgi brothers, however, denied SAICI's claim, and they were apparently then willing to take the risk of the tax liability becoming a judgment against them, providing the federal court could obtain jurisdiction over them.*

G. SAICI's Uncontested State Court Motion For Summary Judgment and the Elements of Collusion:

By Notice of Motion dated October 12, 1971 (A. 374-375), SAICI moved for summary judgment in the state court for the relief demanded in its complaint. The Bosurgis did not contest the motion. In fact, Ginsberg, on behalf of the Bosurgis, consented to the granting of SAICI's motion (A. 460). The motion also sought to consolidate SAICI's action with the Bosurgis' 1966 action against Chemical Bank. The motion was supported by the October 12, 1971 affidavit of SAICI's counsel (A. 376-392)

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* Although the Bosurgis never appeared in this action, jurisdiction over them was obtained by substituted service (A. 68) and by serving Ginsberg with an amended complaint after he was found by Judge Lasker to be the proper agent to serve (A. 84-85).

which set forth the purported documentary evidence in support of SAICI's claim. Also annexed as exhibits were SAICI's counsel's letter dated August 5, 1971 to Ginsberg (A. 428-429) and Ginsberg's written response dated September 14, 1971 (A. 430). SAICI's August 5, 1971 letter enclosed copies of purported documents bearing the signatures of the Bosurgis, and SAICI requested confirmation of authenticity. Ginsberg's September 14, 1971 letter stated that he had returned from Europe "last week, where I conferred with Mr. Leone Bosurgi and his personal attorney" (A. 430) in respect of the documents enclosed in SAICI's August 5, 1971 letter. Ginsberg went to to state *in haec verba*:

> As a result of that conference, I am authorized to inform you that . . . "they are true copies of the originals and that they were duly executed by the persons whose signatures appear thereon, and the English translations thereof are true and accurate".

As subsequent events have shown, Ginsberg's September 14, 1971 letter was given great weight by the Appellate Division of the state court. A preliminary analysis of that letter, however, shows some inconsistencies by Ginsberg. In the letter, Ginsberg says that he spoke to just Leone Bosurgi, and Ginsberg was apparently given very limited instructions of what to say. However, in response to SAICI's motion made on October 12, 1971, Ginsberg submitted an affidavit dated October 20, 1971 (A. 459-463). In that affidavit Ginsberg said that on "August 12, 1971 I conferred with my clients,* in Europe, at a conference attended by their personal attorney" (A. 459) and that "my clients also acknowledged to me that the obligation asserted in the complaint ** herein has not been satisfied and

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* In his September 14, 1971 letter (A. 430), Ginsberg said that during his trip to Europe he spoke to just Leone Bosurgi, but his affidavit says he spoke to both Bosurgi brothers.

** The nature of that "obligation" was not explained by Ginsberg.

that they are unable to suggest any basis upon which they could properly request me to oppose [SAICI's] motion for summary judgment" (A. 460). Because SAICI's motion for summary judgment had not yet been made when Ginsberg conferred with his clients, their discussion could not have dealt with grounds for opposing it. Indeed, Ginsberg's August 12, 1971 conference with the Bosurgis took place a mere seven days after SAICI's counsel had written to Ginsberg (A. 428) requesting the Bosurgis to authenticate certain documents.*

In a subsequent affidavit, Ginsberg "solved" the problem of how the Bosurgis could offer no grounds in August, 1971 to oppose a non-existent motion. In opposing discovery of him by the United States in the federal court, Ginsberg submitted an affidavit dated October 12, 1973 (A. 150-162). As to this matter, Ginsberg stated (A. 157):

> I conferred with my clients, for which purpose I made a trip to Europe, and was informed by them that they could supply no information upon the basis of which I could properly oppose a motion by SAICI for summary judgment. *My trip was required because a motion for that relief had been made*, and it was essential that I either oppose the motion upon proper grounds, or permit it to be disposed of, without opposition. I submitted an affidavit [the October 20, 1971 affidavit, A. 459-463] indicating what I had been informed by my clients [on August 12, 1971], as stated above. [Emphasis added].

However, contrary to the sworn representation of Ginsberg on October 12, 1973 (A. 157), his trip to Europe to confer with the Bosurgis on August 12, 1971 was not required

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* Perhaps in August, 1971 it was the plan of the Bosurgis and SAICI that the Bosurgis would admit to SAICI's claim and then consent to SAICI's pre-planned motion for summary judgment.

because SAICI had moved for summary judgment. In fact, SAICI had not moved for summary judgment, and it did not so move until October 12, 1971 (A. 374-375).

In the proceedings in the Court below on the cross-motions for summary judgment, the United States maintained that as a matter of law SAICI's state court proceedings could have no effect upon the federal court. In the alternative, we maintained that if such proceedings *could* effect the federal court, they would not effect the federal court if such state court proceedings were collusive. SAICI claimed that the state court proceedings were not collusive, and we contended that such proceedings were collusive on their face or in the alternative that there was a genuine issue of fact as to collusion (A. 341-350).* In his opinion, Judge Duffy said that the United States failed to produce any evidence of collusion (A. 483). However, it would seem that the extraordinary circumstances surrounding SAICI's complaint and its subsequent motion for summary judgment would warrant inquiry into collusion.

Ginsberg represented the Bosurgis in SAICI's action, after he represented that he had no authority to appear for them in the Government's action (A. 30). In their verified answer (A. 409-411) to SAICI's complaint (A. 393-398), the Bosurgis denied the central allegations that SAICI owned the $215,000 fund and that the Bosurgis had no interest in it. They also denied any knowledge of the purported trust agreement dated December 10, 1954 bearing their signatures. Ginsberg then wrote a letter to SAICI (A. 430) saying that he conferred with Lecne Bosurgi who agreed to the authenticity of certain documents including

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* Judge Duffy, in footnote 1 of his opinion (A. 489), suggested that because the United States raised a factual issue of collusion, it should have withdrawn its motion for summary judgment. Such issue of collusion became relevant only if the Court rejected our contention that the state court proceedings had no effect upon the federal court as a matter of law.

the purported December 10, 1954 trust agreement which was annexed as an exhibit to the complaint of which the Bosurgis previously professed no knowledge. Thus, either the Bosurgis lied to Ginsberg when he prepared their answer to SAICI's complaint or Leone Bosurgi lied to Ginsberg when Ginsberg subsequently conferred with him in Europe. Ginsberg, then in an affidavit (A. 157), said that his August 12, 1971 conference with both the Bosurgis was *required* because of SAICI's pending motion for summary judgment, which motion was not in fact made until October 12, 1971. The Bosurgis, on the other hand, never submitted any affidavits. The Bosurgis would not appear in the federal court action. However, they were willing litigants in SAICI's state court action, where SAICI had told Ginsberg that its action, if successful, would defeat the tax claim (A. 390). Finally, the Bosurgis were represented by Ginsberg in SAICI's state court action at the same time Ginsberg had an outstanding motion (A. 58-59) pending before Judge Lasker to vacate service of process on him because he asserted that was not authorized to represent the Bosurgis (A. 30).

We respectfully contend that it would be to the Bosurgis' tax interest to admit the claim of SAICI. The Bosurgis probably told Ginsberg the truth prior to the time he answered SAICI's complaint for them, but perhaps they were not aware of American procedure that defendants answer a complaint. Thus, the truth came out in the Bosurgis' answer, but subsequently they attempted to repudiate their answer in order to admit SAICI's claim. The Bosurgis' "admissions" came in the form of Ginsberg's September 14, 1971 letter (A. 430) and his October 20, 1971 affidavit (A. 459-463). However, Ginsberg's affidavit and subsequent October 12, 1973 affidavit (A. 157) contained a factual faux pas that his trip to Europe and conference with the Bosurgis on August 12, 1971 was required because SAICI had moved for summary judgment which motion was not in fact made until two months later. If in fact the Bosurgis were willing to concede SAICI's claim, they could have done so by a simple stipulation in order to avoid a needless motion for summary judgment. We respectfully submit that the

motion was made and not contested solely because SAICI and the Bosurgis desired to obtain a "litigated" factual finding *ex parte* the United States which would, hopefully, be binding on the United States for tax purposes.

H. The State Court's Denial of SAICI's Motion for Summary Judgment and Ginsberg's Application for a Fee:

In his October 20, 1971 affidavit (A. 459-463) in response to SAICI's motion, Ginsberg requested that he be authorized to retain from the $215,000 fund the sum of $78,800.19 plus 40% of the accrued interest as his attorney's fee.

While SAICI's motion and Ginsberg's fee application were pending before the state court, the Assistant United States Attorney in charge of the federal action wrote three letters to the state court parties and Mr. Justice Kapelman. In the October 28, 1971 letter (A. 315), we took the position that because the $215,000 fund was subject to the jurisdiction of the federal court and because the United States was not a party in the state court, "any final order of the state court will not be res judicata or collateral estoppel with respect to the rights of the United States" (A. 316). The letter requested that the state court parties discontinue that action and pursue their rights in the District Court. In the November 12, 1971 letter (A. 318), written two days after Judge Lasker denied Ginsberg's motion to vacate service on him as agent for the Bosurgis (A. 64), the possibility of SAICI voluntarily appearing in the federal court was explored.* The February 9, 1972 letter (A. 322) in-

* SAICI did not voluntarily appear in the federal court, and on November 3, 1971 the United States moved to amend its complaint to join Ginsberg and SAICI as adverse claimants to the fund (A. 70-71). The motion was granted on November 29, 1971 (A. 76). On December 1, 1971, the amended complaint was filed (A. 77), and on December 17, 1971 proof of service was filed (A. 84-87). Ginsberg was served with the amended complaint as agent for the Bosurgis (A. 84-85).

formed Mr. Justice Kapelman of the proceedings in the federal court.

Pursuant to an opinion dated January 24, 1972, Mr. Justice Kapelman denied SAICI's uncontested motion for summary judgment and denied Ginsberg's application for a fee (A. 370-373). His opinion pointed out that SAICI was being joined in the federal court, the United States was not a party in the state court, the federal court's jurisdiction over the fund prevented state court disposition of it, and that the "evident" purpose of SAICI's motion "is to force the expeditious disposition of the determination of conflicting interests" (A. 372).

I. SAICI's Resistance to Litigate Its Claim With The United States In the Federal Court:

Service on SAICI of the United States' amended complaint was made by service on its state court counsel on December 7, 1971 (A. 87). On December 22, 1971, SAICI moved to set aside service of the amended complaint on the ground that its counsel had no authority to accept service (A. 88-98). This was consistent with SAICI's hope not to confront the United States on the merits, notwithstanding its representation to the contrary. Pursuant to the opinion and order of the Honorable Edward Weinfeld dated June 5, 1972, SAICI's motion to set aside service of the United States' amended complaint was denied (A. 130-139). Judge Weinfeld pointed out that the fund in question was subject to the jurisdiction of the federal court, that the United States was not a party to SAICI's state court action, that SAICI would eventually have to face the claim of the United States, and that service of the United States' amended complaint upon SAICI's state court counsel "was not only adequate, but probably optimal" (A. 137).

At this juncture, the United States was assured that the merits of Ginsberg's fee claim and SAICI's ownership claim

would be resolved by the federal court. The federal court had jurisdiction of the $215,000 *res*, all adverse claimants were joined as parties, and Mr. Justice Kapelman had denied SAICI and Ginsberg relief in the state court. On June 1, 1972, the Federal Court entered an *in rem* default judgment against the Bosurgis for $215,000 plus interest (A. 122-129).

J. SAICI's and Ginsberg's Appeal to the Appellate Division and the Federal Court Stay of Discovery Sought Against Them:

SAICI and Ginsberg appealed the denial of their uncontested state court motions to the Appellate Division. SAICI, Ginsberg and the Bosurgis were not willing to accept litigation with the United States on the merits after having been joined as parties to the federal action. Instead, they did all in their power to force an expeditious uncontested ruling in the state court *ex parte* the United States that SAICI and not the Bosurgis owned the fund and that Ginsberg was entitled to a fee for the amount he claimed. The United States was not served with either the state court appellate briefs or the record on appeal (A. 349). The United States learned of the prosecution of the appeals by a telephone call from Chemical Bank's counsel to the United States Attorney's Office (A. 338). Upon learning of the appeal, the United States on September 14, 1973 wrote to the Appellate Division pointing out the recent facts (A. 190-192). That letter was returned to the United States Attorney by the Clerk of the Appellate Division on September 18, 1973 (A. 193).*

* In footnote 5 of his opinion (A. 490), Judge Duffy says that "the government fails to admit that it had received their [SAICI's and Ginsberg's] notices of appeal and that it attempted to file a letter-brief with the Appellate Division." To the contrary, on page 26 of our February 7, 1974 Memorandum of Law in Support of Motion for Summary Judgment we pointed out

[Footnote continued on following page]

In October, 1973, the United States sought discovery from Ginsberg and SAICI as to their claims. On October 3, 1973 the United States noticed the deposition of Ginsberg and requested the production of documents for October 24, 1973 (A. 145-146). On October 3, 1973, the United States noticed the deposition of SAICI's officer, employee or director having knowledge of its claim and requested production of documents for November 6, 1973 (A. 147-148).

On October 12, 1973, Ginsberg filed a Notice Pursuant to Section 30(d) (A. 149) demanding suspension of his deposition. By Notice of Motion dated October 12, 1973, Ginsberg moved for a protective order (A. 150-151). The United States opposed that motion (A. 168-177). In an order entered on November 8, 1973 (A. 195) the Appellate Division reversed Mr. Justice Kapelman as to both SAICI's and Ginsberg's uncontested motions. The Appellate Division remanded Ginsberg's fee question for a hearing to fix his fee. The Appellate Division held (A. 194) that the uncontested motions should have been granted because the facts alleged by SAICI were conceded to be true by the Bosurgis, but that such result would not affect the federal tax liens. Ginsberg filed an affidavit (A. 184) dated November 9, 1973 pointing out the Appellate Division's opinion. By order dated November 14, 1973, Judge Duffy granted Ginsberg's motion for a stay of discovery (A. 197).

On December 14, 1973, Judge Duffy issued an order to show cause staying discovery of SAICI until a hearing on SAICI's application for a stay was held (A. 198-199). The United States submitted a Memorandum of Law dated De-

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that we wrote the letter to the Appellate Division. Although SAICI's and Ginsberg's Notices of Appeal were mailed to the United States Attorney in August, 1972, there is no dispute that they did not serve the United States with the Record on Appeal or their briefs. It would seem that if SAICI and Ginsberg had wanted the United States to have effective notice of the prosecution of their appeals, they would certainly have served the United States with the record and their briefs.

cember 19, 1973 in opposition to SAICI's application for a stay. We consented to postpone the deposition if SAICI would produce the requested documents. SAICI's motion was heard before Judge Duffy on December 20, 1973. SAICI and Ginsberg asserted that they were prepared to move for summary judgment, and the stay of discovery of both of them was continued until their motions for summary judgment were made and decided.

K. Summary Judgment Motions in the Federal Court:

On January 21, 1974 and January 28, 1974, SAICI and Ginsberg, respectively, moved for summary judgment in the federal court (A. 216-217, 264-266). The United States opposed and on February 7, 1974 moved for summary judgment against SAICI (A. 284-285). Chemical Bank also moved for summary judgment on the ground that if SAICI prevailed, then the tax claim against Chemical Bank must fail (A. 325-326). Pursuant to an opinion dated February 25, 1975 (A. 479-491), Judge Duffy granted the motions for summary judgment by SAICI, Ginsberg and Chemical Bank, denied the motion for summary judgment by the United States, vacated the March 18, 1971 order, vacated the June 2, 1971 *in rem* default judgment against the Bosurgis, and dismissed the United States' complaint. An order and judgment was entered on June 4, 1975 (A. 494-496) reflecting the above, except that the March 18, 1971 order was continued "pending final resolution (including appeals) of all tax claims in this action."

Summary of Argument

The factual issue in this tax collection action was whether Adriana Bosurgi, on the date of her death, owned the Chemical Bank securities account registered in her name or whether that account and its $215,000 proceeds were owned by SAICI. The Court below erroneously denied

the United States' motion for summary judgment to dismiss SAICI's claim of ownership because the United States presented SAICI's admittedly accurate and complete financial statements and other data establishing beyond doubt that SAICI had no valid claim of ownership. SAICI asserted that it was entitled to prevail because of the uncontested state court factual finding that it owned the account and is $215,000 proceeds. The Court below erroneously granted SAICI's motion for summary judgment because SAICI produced no evidence probative of its claim and because the Court below stayed the United States from taking discovery of SAICI. The Court below erred in accepting the uncontested factual finding by the state court because (1) the state court had no jurisdiction to make such a factual finding, (2) there was evidence that the state court proceedings were collusive against the United States, and (3) the United States was not a party to the state court proceedings. The Court below also erred in granting Ginsberg an attorney's lien because the amount of his lien had not been established in the Court below or by any other court of competent jurisdiction.

ARGUMENT

POINT I

The United States was entitled to prevail on its motion for summary judgment to dismiss the claim of SAICI because the undisputed documentary evidence established that SAICI did not own the securities account or the $215,000 fund.

In support of its motion for summary judgment to dismiss the claim of SAICI, the United States submitted a Statement Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York (A. 286-324). This statement set forth facts about SAICI and the account which it claimed to own. Rule

9(g) provides that upon any motion for summary judgment, there shall be annexed to the Notice of Motion "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." The party opposing summary judgment shall submit a similar statement "of the material facts as to which it is contended that there exists a genuine issue to be tried." The statement of material facts submitted by the movant "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

SAICI did not submit a Rule 9(g) statement with its motion for summary judgment, but it did submit a two paragraph purported Rule 9(g) statement in opposition to the United States' motion (A. 327-328). Paragraph 1 of SAICI's opposing statement stated that "there are no material facts as to which there exists a genuine issue to be tried, such material facts having heretofore been set forth in SAICI's papers in support of its application for summary judgment before this Court." Thus, SAICI did not set forth the material facts it relied upon, and its bald reference to the material facts set forth in its "papers" certainly did not satisfy the requirement of Rule 9(g) requiring an actual statement of the material facts relied upon. Paragraph 2 stated that as to the facts set forth in the United States' Rule 9(g) statement, "paragraphs 2, 3, 6, 7, 8 and 9 are not material; moreover, they are not admissible and not at issue in these proceedings inasmuch as they are based on documentary hearsay and, accordingly, are deemed controverted."

The numbered paragraphs of the United States' statement which SAICI claimed were "not material" dealt with when the securities account was opened and the initial deposit (¶ 2), the 1962 and 1963 tax returns filed by Chemical Bank showing the dividend income earned by the account (¶ 3), SAICI's financial statements (¶ 7 and 8), and the stock records of W. Sanderson & Son showing the ownership interests of SAICI and the Bosurgis (¶ 9). Such facts were

clearly material to SAICI's claim of ownership of the account because they set forth facts about the account and facts of SAICI's assets. SAICI's assertion that such facts were "not admissible" and "not at issue" and for those sole reasons "deemed controverted" was subsequently explained by SAICI in its memorandum of law in support of summary judgment as a statement of its position that the uncontested factual finding by the Appellate Division that SAICI owned the account and the $215,000 fund was binding on the whole world, and especially the United States, and therefore not subject to further judicial inquiry. The facts set forth by the United States were facts about SAICI and the account it claimed to own. SAICI was clearly in a position to know whether those facts about it were true. It did not controvert those facts, but merely asserted that they were not material and not at issue. Thus, pursuant to Rule 9(g), such facts were deemed admitted as true, subject only to SAICI's claim that the factual determination by the Appellate Division barred further judicial inquiry.

In his opinion, Judge Duffy held that United States was not bound by the Appellate Division's factual finding, and he accepted the accuracy of the facts set forth in the United States' Rule 9(g) statement. However, he held that those facts did not prove that SAICI did not own the account or the $215,000 fund. This latter finding was clearly erroneous.

The Chemical Bank securities account was opened on May 13, 1954 by Adriana Bosurgi at Chemical Bank in New York City with a cash deposit of $400,000 (A. 286-287, 296). The $400,000 was to be invested in stocks producing an annual yield of about 5% (A. 296). On the date Adriana Bosurgi opened the account, she executed a Custodian Account Agreement (A. 286-287, 290-295). Section 5 of the agreement (A. 292) designed her as owner of the account and she authorized Chemical Bank "to execute, as agent, in the name of the undersigned, as owner, any and all income tax ownership certificates, or other instruments which,

[are required] pursuant to the provisions of the income tax regulations of the United States Treasury Department . . ." There was no indication that anyone other than Adriana Bosurgi owned the account.

There is no dispute that Adriana Bosurgi died on March 27, 1963 and that on that date the account was registered in her name as owner. The fair market value of the securities account was $1,097,189.39 and the total value of her property within the United States subject to the estate tax was $1,202,740.47 (A. 170-171).* For the year 1962, the account earned dividend income of $31,714.14 (A. 297). For the 1963 period up to Adriana Bosurgi's death, the account earned dividend income of $9,565.38 (A. 298).** On April

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* In the affidavit dated October 25, 1973 submitted by the United States in opposition to Ginsberg's motion for a stay of discovery, the United States indicated that there may have been an error in the computation of the tax based upon the above value of property located in the United States (A. 172-173). However, the United States' memorandum of law dated February 20, 1974 pointed out that the tax was not erroneously computed and that the amount sued for had been verified as correct by the Internal Revenue Service.

** Judge Duffy, in footnote 8 of his opinion (A. 491), stated that the government did not offer Mrs. Bosurgi's tax returns, but Forms 1042S for the year 1962 and the truncated 1963 period filed by Chemical Bank showing the owner of the account, its income, and the tax withheld (A. 296-297). Those forms were the appropriate tax returns for Mrs. Bosurgi. Treasury Regulation, Section 1.6012-1(b)(2)(i) provides that a nonresident alien individual who at no time during the taxable year is engaged in a trade or business in the United States is not required to file a tax return if the tax liability of such person is fully satisfied by the withholding of tax at the source of income. Treasury Regulation, Section 1.6012-1(b)(3)(i) provides that the responsible representative or agent within the United States of a nonresident alien individual shall make on behalf of such person the appropriate tax return and shall pay the tax on all income subject to tax coming within the control of the United States agent or representative. Form 1042S was the appropriate tax return filed by Chemical Bank on behalf of Adriana Bosurgi, and her Custodian Account agreement authorized Chemical Bank to prepare and file such returns.

9, 1963, a portion of the account was transferred to the Bosurgi brothers (A. 287, 303). On April 10, 1963 they executed a Custodian Account agreement with Chemical Bank which was accepted by it on April 22, 1963 (A. 287, 299-302). Their agreement authorized Chemical Bank "to execute as Agent and in the name of the undersigned, all necessary certificates of ownership which may be required by the income tax regulations of the United States . . ." (A. 300).

The United States put into evidence SAICI's accurate and complete financial statements for the years ending December 31, 1955 through December 31, 1963 which statements SAICI had published pursuant to the laws of Uruguay (A. 287, 304-310). There were no financial statements prior to 1955. The accuracy of these financial statements was not disputed. If, in fact, SAICI owned the securities account, its financial statement would reflect gross assets of at least $400,000 for the early years and gross assets in excess of $1,000,000 for 1962 and 1963. Also, its income statements would reflect gross income of about $20,000 for the early years (5% of $400,000) and gross income of about $30,000 for 1962. However, SAICI's financial statements did not reflect any such assets or income, and thus it did not own the account. The highlights of SAICI's financial statements disproving its claim are as follows:

First, SAICI's gross assets ranged from $50,900 as of December 31, 1955 to $79,441.70 as of December 31, 1963. There were no financial statements for any year preceding 1955. This establishes two facts. First, because SAICI had no assets until *after* the securities account was opened by Adriana Bosurgi on May 13, 1954 with a deposit of $400,000, SAICI had no interest in the account when it was opened. Second, because of the nominal amount of SAICI's gross assets, it could not have owned the securities account or a $215,000 interest in it at any time between 1954 and March 27, 1963 when Adriana Bosurgi died.

Second, of its total gross assets, the constant sum of $32,112.01 was reported as its ownership of "Foreign shares and securities." This amount was its ownership of 20,000 shares of stock of W. Sanderson & Sons, an Italian corporation, which were acquired by SAICI on December 16, 1954 (A. 288), and owned by it at the end of 1963 (A. 311-313). It will be recalled that SAICI's state court complaint alleged that it advanced unspecified "large sums of money" to Sanderson for the building of a citrus plant in Argentina (A. 394). The above establishes two facts. First, all of SAICI's ownership of foreign shares and securities was ownership of stock other than the assets of the securities account. Second, the sums "advanced" to Sanderson were in fact SAICI's investment in Sanderson's stock.* Thus, SAICI at no time had any interest in the securities account.

Third, SAICI had no gross income until 1956, and it had no gross income during 1962 or 1963. However, it had nominal gross income between 1956 and 1962. The securities account earned income beginning in 1954, its 1962 dividend income exceeded $30,000, and its partial 1963 dividend income exceeded $9,000. Because SAICI had no income interest in the securities account and no income prior to Adriana Bosurgi's death, SAICI had no interest in the securities account.

Fourth, SAICI's state court complaint alleged that its ownership of the securities account came about pursuant to a trust agreement dated December 10, 1954 (A. 395). That agreement **, annexed as an exhibit to the complaint (A.

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* The Sanderson stock records (A. 311-313) also reflect that the Bosurgis and SAICI were the majority stockholders of Sanderson; and in May, 1954 Adriana Bosurgi revealed to Chemical Bank that her family owned Sanderson (A. 296).

** It should be noted that the signature of SAICI's president on that agreement is admittedly illegible (A. 402). Whether this was an intentional act by SAICI to avoid knowledge of its president is unknown.

400-402), recited that SAICI had loaned money to Sanderson and that "repayment to the financing company [SAICI] shall take place gradually by means of deposits in dollars in New York, into a New York bank to be indicated by [SAICI]" (A. 401). The financial statements do not show that SAICI loaned money to anyone. Thus, the alleged source of funds to establish the purported trust never existed. The financial statements do not reflect any *gradual* repayment of an alleged loan or any *gradual* deposits into the securities account. Thus, the required mechanics for funding the purported trust never occurred. Finally, the trust agreement provides that the Bosurgis would make periodic accounting to SAICI showing income, profits, and the balance of funds owned by SAICI (A. 401). SAICI's financial statements show no income and no balance of funds belonging to SAICI.

The financial statements exorcise SAICI's claim of ownership of the securities account and the $215,000 fund. The devastating effect of SAICI's financial statements accounts for its contention that they should be ignored. SAICI has admitted that if it established ownership of the account, the tax claim against the Borsurgis would fail. SAICI did not own the securities account or any portion of it. Its claim was a sham. SAICI at no time in the state court or federal court alleged or offered to prove the amount of its purported loan to Sanderson, the amount repaid, the dates repayments were made, or the gross amount of its deposits in the securities account. It is patently clear that the reason SAICI did not allege or offer to prove even one detail of its claim was because there were no details.

In order for SAICI to overcome the effect of its accurate financial statements that it has no interest in the securities account and the representations by the Bosurgis that they owned the securities account, it was incumbent upon SAICI to produce evidence that it owned the account. Absence

such proof, the motion of the United States to dismiss SAICI's claim was required to be granted. As stated in 6 Moore's *Federal Practice* (1974 Ed.) ¶ 56.11[3] at 2170 *et seq*:

> Stubborn reliance upon allegations and denials in the pleadings will not alone suffice, when faced with affidavits or other materials showing the absence of triable issues of material fact.
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> * * * * *
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> [The party opposing summary judgment] need not, of course, show that the issue would be decided in his favor. But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue.

SAICI did not come forward with evidence showing that there was a triable issue of fact. SAICI produced no affidavit from either of the Bosurgi brothers and no affidavit from any of its officers or agents. Also, SAICI produced no financial records evidencing its ownership of the securities account.

Instead, SAICI presented to the federal court the same information that it presented to the state court. This consisted of the exhibits annexed to SAICI's counsel's affidavit filed in the state court (A. 376-456). These included (1) the purported trust agreement dated December 10, 1954, (2) six purported letters by the Bosurgis to SAICI, (3) SAICI's counsel's August 5, 1971 letter to Ginsberg, and (4) Ginsberg's September 14, 1971 letter to SAICI's counsel. None of this material was probative of SAICI's claim. The defects in the purported trust agreement have been previously indicated as wholly inconsistent with SAICI's finan-

cial statements and the representations by the Bosurgis.* None of the purported letters shows that SAICI had any interest in the securities account. SAICI's counsel's August 5, 1971 letter to Ginsberg (A. 428-429) asked Ginsberg's clients to "authenticate" the above documents and others. Ginsberg's September 14, 1971 letter (A. 430) to SAICI's counsel states that he conferred with Leone Bosurgi and his attorney and that "As a result of that conference, I am authorized to inform you that . . . 'they [the documents] are true copies of the originals and they were duly executed by the persons whose signatures appear thereon, and the English translations thereof are true and accurate'." This letter does not say or purport to say that the documents were executed at or about the time indicated, that the transactions contemplated in the purported trust agreement or letters ever took place, or that as of the date of Adriana Bosurgi's death SAICI had any interest in the securities account. Thus, this material submitted by SAICI was not probative of its claim.

A further reason why this material could not be probative is that it was inadmissible. The trust agreement and letters were annexed to the affidavit of SAICI's counsel who has admitted that he has no actual knowledge about SAICI or the authenticity of the documents (A. 348). The statement by Ginsberg about what Leone Bosurgi told him

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* As to the fact that the securities account was opened with a $400,000 deposit seven months before the trust agreement was purportedly executed, which agreement called for "gradual" deposits, Judge Duffy concluded that this is irrelevant because "the trust agreement recites that it is a confirmation of an earlier oral agreement" (A. 486). The trust agreement does not say that it confirms an earlier agreement but its preamble states (A. 400): "Following the verbal agreements carried out up to the present day, the parties hereto agree on the following points". The nature of the "verbal agreements" or when they were made have not been established at all, and SAICI made no specific contention that the $400,000 lump sum deposit made by Adriana Bosurgi in May, 1954 belonged to it.

was pure hearsay.* Rule 56(e) of the Federal Rules of Civil Procedure states that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." When an attorney's affidavit is submitted in a motion for summary judgment and when the affiant does not have personal knowledge about the matters set forth, such affidavit has no probative value and is inadmissible. 6 Moore's *Federal Practice* (1974 Ed.) ¶ 56.22[11] at 2803, note 17. Thus, the affidavit of SAICI's counsel attesting to certain documents and Ginsberg's September 14, 1971 letter were not probative of SAICI's claim and not admissible.**

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* There is also a question of whether Ginsberg accurately recalled the facts. His letter (A. 430) says that he talked to just Leone Bosurgi, but his two subsequent affidavits says he spoke to both brothers (A. 459-463, 152-162). Also, his affidavits say that his conference with the Bosurgis was required because SAICI had made a motion for summary judgment, but in fact the date of his conference with Leone and/or both preceded SAICI's motion by two months.

** The Court below did not dispute the contention that the material submitted by SAICI's counsel in his affidavit and the Ginsberg letter were inadmissible by virtue of Rule 56(e). Nevertheless, the Court accepted them because it was presented by SAICI's counsel to the state court in SAICI's uncontested motion (A. 491). We know of no rule of law standing for the proposition that evidence otherwise inadmissible by virtue of Rule 56(e) becomes admissible and binding on the United States because such evidence was not objected to in an uncontested state court motion not involving the same parties.

POINT II

The United States was entitled to prevail as a matter of law on its motion for summary judgment to dismiss the claim of SAICI because the income tax benefit conferred on Adriana Bosurgi estops SAICI from asserting that she did not own the securities account.

Until June, 1971 when SAICI commenced its state court action, all persons who had any knowledge about the securities account represented that it was owned by Adriana Bosurgi at the time of her death. Adriana Bosurgi represented that she owned the account when she opened it in 1954 and executed the Custodian Account agreement (A. 290-296). When the account was transferred to her two sons shortly after Adriana Bosurgis' death, they represented that they owned the account (A. 299-301). When the Bosurgi brothers sued Chemical Bank in 1966, they represented that they owned the account (A. 431). When Chemical Bank answered the United States' complaiat, it represented that the account was formerly owned by Adriana Bosurgi and then her two sons (A. 24). Even when the Bosurgi brothers answered SAICI's state court complaint, they denied that SAICI owned the securities account or the $215,000 fund (A. 409-411).

By reason of the fact that there was a consistent and repeated representation that the securities account was owned by Adriana Bosurgi from 1954 until her death, she obtained an income tax benefit inconsistent with SAICI's claim of ownership. Section 871(a)(1)(A) imposes an income tax rate of 30% on all dividend income earned in the United States by non-resident alien individuals not connected with a United States trade or business. However, pursuant to Section 894, the method of taxation of foreign persons may be governed by treaty. Article VII of the 1956 Tax Treaty between the United States and Italy, 7

U.S. Treaties (Part III) 2999, 3006, Treaties and International Agreement Series 3679, established a 15% United States income tax rate on United States dividend income earned by Italian citizens who were non-resident aliens of the United States. Thus, the tax rate applicable to Adriana Bosurgi was 15%, and this rate was reflected on the two most recent 1962 and 1963 tax returns (A. 297-298). However, if SAICI owned the securities account, the rate of income tax was 30%, not 15%. Section 881(a)(1) imposes an income tax at the rate of 30% on dividend income earned by foreign corporations not engaged in business in the United States. There is no treaty between the United States and Uruguay modifying this 30% rate. Thus, the taxes paid by Adriana Bosurgi were inconsistent with SAICI's claim.

SAICI has not volunteered to pay the income taxes it owes, but it is clear that income taxes were underpaid by half if SAICI's claim of ownership is correct. Thus, we have a case where inconsistent tax positions are advanced. Income taxes were voluntarily paid at a 15% rate on the basis that Adriana Bosurgi owned the securities account. However, when a claim for estate taxes was asserted on the basis that Adriana Bosurgi owned the securities account, SAICI, through the Bosurgis, asserted that it owned the account. When this type of factual pattern is presented, a person in SAICI's position is estopped to deny that Adriana Bosurgi owned the securities account.

The courts have held that when a person obtains a benefit from the United States, then such person and those in privity with such person are estopped from taking a factual position with the United States inconsistent with the benefit previously conferred. *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513 (1953); *Comm.* v. *National Lead Co.*, 230 F.2d 161 (2nd Cir. 1956), *aff'd*, 352 U.S. 313 (1957); *Dan-Air Services, Ltd.* v. *C.A.B.*, 475 F.2d 408, 412 (D.C. Cir. 1973); and *Admiral Towing Co.* v. *Woolen*, 290 F.2d 641

(9th Cir. 1961). In this case, the benefit obtained was a 15% tax rate rather than a 30% tax rate predicated on the represented fact that Adriana Bosurgi owned the securities account. SAICI was in privity with the Bosurgis, so it claims. Thus SAICI is estopped from taking a position, based on a purported admission by the Bosurgis, factually inconsistent with the beneficial 15% tax rate. This principle of estoppel based upon factual representations made by a taxpayer to the United States was most recently applied in *Stair* v. *United States*, (2nd Cir. 5/9/75, Docket No. 74-2625), 75-1 U.S.T.C. ¶ 9463.

For this reason, the United States' motion to dismiss SAICI's claim is required to be granted as a matter of law.

POINT III

Even if the United States is not entitled to judgment dismissing SAICI's claim, the judgment of the Court below granting SAICI's motion for summary judgment must be reversed and remanded because SAICI produced no evidence probative of its claim and the United States was denied the right to take discovery of SAICI.

The Court below held that SAICI was the owner of the account and the $215,000 fund and therefore entitled to summary judgment based upon the evidence submitted. In reaching this conclusion Judge Duffy stated that he considered SAICI's financial statements, the consistent and repeated representations by Adriana Bosurgi and her two sons as to ownership of the account, and the income tax differential between the Bosurgis and SAICI. As demonstrated in Point I, *supra*, the facts to be drawn from this proof was that SAICI's claim was devoid of merit. No other conclusion was reasonable. Even if on this appeal SAICI can hypothecate inferences favorable to its claim

of ownership, it is clear that a remand is required. In considering whether SAICI's motion for summary judgment should be granted, all inferences of fact must be drawn against it, and the inference of fact (if not the conclusive inference) is that SAICI did not own the securities account or the $215,000 fund. 6 Moore's *Federal Practice* (1974 Ed.) ¶ 56.15[3] at 2337 states: "Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." This rule applies whether or not a jury trial has been demanded, and in this action a jury trial has been demanded (A. 37-38). Thus, based upon the evidence presented which shows that SAICI did not own the securities account or the $215,000 fund, the United States was entitled to the inference that SAICI's claim was infirm; and therefore the granting of SAICI's motion for summary judgment was reversible error.

One of the reasons stated by Judge Duffy in granting SAICI's motion for summary judgment was that "there is no reason not to give proper regard to the State court proceedings . . . [because] such interests as judicial economy are enhanced by allowing competent State tribunals * to decide issues of State law ** . . ." (A. 484). Essentially then, Judge Duffy ruled that an erroneous state court factual finding of uncontested factual issues, in an action in which the United States was not a party, will not be subject to

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* In Point IV, *infra*, we point out that the state court was not competent, *i.e.*, did not have jurisdiction, to decide the uncontested issue of fact presented to it.

** In Point V(B), *infra*, we point out that the state court did not decide an issue of state law, as stated by Judge Duffy, but an uncontested issue of fact, and that a state court factual resolution does not bind or have any effect upon a federal court in a related tax suit.

de novo review in a federal court tax suit because to do so would be in conflict with the paramount need to enhance judicial economy. We respectfully submit that this view of "judicial economy" is incorrect. For example, in *Sharp* v. *United States,* 263 F. Supp. 884 (S.D. Tex. 1966), a tax refund suit, one issue was whether the taxpayer realized taxable income on the disposition of bonds. In a prior state court action, in which the United States was not a party, it was held that the taxpayer did not own the bonds. In his motion for summary judgment in the federal court, the taxpayer argued that the state court judgment controlled. The federal court ruled that the state court factual finding might not have been correct and for that reason denied the taxpayer's motion for summary judgment stating:

> Viewing all inferences to be drawn from the underlying facts in this record in the light most favorable to the Government, Plaintiff [taxpayer] has not shown that no genuine issue of fact exists. *United States* v. *Diebold, Inc.,* 369 U.S. 654 (1962); *Whittaker* v. *Coleman,* 115 F.2d 305, 5 Cir. 1960. 263 F. Supp. at 891.

In the instant case the United States has clearly shown that an issue of fact exists as to SAICI's claim of ownership. Thus, notwithstanding SAICI's success on it uncontested motion before the state court, it is not entitled to summary judgment against the United States in the federal court. The policy for judicial economy does not outweigh the stronger policy that a motion for summary judgment cannot be granted when genuine issues of fact exist.

Finally, prior to the motions for summary judgment, the Court below stayed the United States from taking any discovery of SAICI (A. 198-199). As a result, the United States did not have the opportunity to examine SAICI on the basis of its claim. 6 Moore's *Federal Practice* (1974 Ed.) ¶ 56.15[5] at 2397 states that the "party opposing summary judgment must be given a reasonable opportunity

to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving party." Thus, when a federal court denies discovery by one party against the other and then grants the latter's motion for summary judgment, the granting of such motion is reversible. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016 (3d Cir. 1942).

POINT IV

The factual determinations in the State Court as to ownership of the $215,000 fund and the amount of Ginsberg's lien were void for lack of subject matter jurisdiction.

The Court below held that it was required to give "considerable weight" to the factual finding by the Appellate Division (A. 484) even though the United States was not bound by or a party to the state court proceedings. However, before a result had in a court may be given any weight, the court must have the jurisdiction to make a determination. Because the state court proceeding sought only to determine ownership and lien interests in a fund of money, any such determination would be void unless the state court had jurisdiction over the subject *res*, or jurisdiction to determine the issue presented.

A. The State Court Judgment Was Void Because the State Court Did Not Have Jurisdiction Over the *Res*:

SAICI commenced its state court action in June, 1971 against the Bosurgi brothers and Ginsberg. That action was not an *in personam* action to obtain a money judgment, but an *in rem* action to recover the $215,000 fund in Ginsberg's possession. In that action Ginsberg sought to establish his lien against the fund. The United States was not a

party to that action, and at no time did the state court obtain jurisdiction of the $215,000 fund previously subjected to the jurisdiction of the federal court. SAICI contemplated, but never obtained, a state court order of attachment (A. 387). Instead, SAICI hoped to secure subject matter jurisdiction over the *res* by a "simple stipulation" between SAICI and Ginsberg (A. 387). In denying SAICI's uncontested motion for summary judgment, Mr. Justice Kapelman recognized the fact that the federal court had jurisdiction of the fund which prevented state court disposition of it. The Appellate Division did not reverse this legal holding.

The federal court had jurisdiction of the *res*, and no effort was made to subject that *res* to the jurisdiction of the state court. It is an immutable principle of law that when one court acquires jurisdiction of a *res*, no other court may acquire jurisdiction of that *res* or adjudicate interests in it. *Farmer's Loan & Trust Co.* v. *Lake Street Ele. R.R.*, 177 U.S. 51, 61 (1900); *Corell* v. *Heyman*, 111 U.S. 176 (1884); and *Hogen* v. *Lucas* 35 U.S. 400 (1836). Accordingly, the state court Appellate Division factual determinations as to SAICI's ownership and the subsequent state court determination of the amount of Ginsberg's lien were void and entitled to no weight before the federal court.

As to Ginsberg's lien, Mr. Justice Kapelman held that the state court did not have jurisdiction to determine the amount of his lien because the federal court had jurisdiction of the *res* upon which Ginsberg sought to satisfy his lien. The Appellate Division reversed, but it did not rule on the jurisdictional issue; and the Appellate Division remanded for a hearing to fix Ginsberg's fee. Ginsberg asserted that he was entitled to a fee of 40% of the fund based upon an alleged retainer agreement between himself and the Bosurgis (A. 462-466). On remand, Mr. Justice Kapelman allowed a fee of 35% of the fund (A. 262). However, that finding by the state court was void because it did not have jurisdiction

over the fund. New York law is clear that an attorney's lien can be awarded by a state court only if "the fund against which the lien is asserted is under the jurisdiction of the court in which the lien is sought to be enforced . . ." *In re Levine's Estate,* 154 Misc. 700, 703 (Surr. Ct. N.Y. Co.), *aff'd,* 247 App. Div. 19 (1st Dep't. 1936), 286 N.Y.S. 513. If the fund in question is before a federal court, then the federal court shall award an attorney's lien fee from that fund by applying the applicable state law. *In re Baxter & Co.,* 154 F. 22 (2d Cir. 1907). Thus, the only court with jurisdiction to award Ginsberg a lien fee is the court with jurisdiction over the fund in question; and in this case, that court was the federal court and not the state court.

In the instant case, the United States asserts a tax lien upon the entire $215,000 fund. Ginsberg is entitled to an attorney's lien priority to that fund only because federal law so provides. Section 6323(b)(8) provides the federal tax lien shall be inferior to the lien of an attorney, enforceable under state law, "to the extent of his reasonable compensation" in obtaining, by reason of a judgment or settlement of a claim, the property to which the tax lien of the United States attaches. Thus, where an attorney has an enforceable lien by reason of state law, such lien will be granted priority to the tax lien, but only to the extent of allowing the attorney "reasonable compensation." The factual determination of what constitutes "reasonable compensation" is a question to be decided only by the federal court because it has jurisdiction over the fund and because Ginsberg was made a party to the federal court action pursuant to Section 7403 which provides that all persons having claims to the property involved *shall* be made parties and that the federal court *shall* adjudicate the merits of all claims.

B. Because Ginsberg was the Federally Appointed Custodian of the $215,000 Fund, Only the Federal Court, and Not the State Court, Could Adjudicate Interests in that Fund:

The law is also clear that when the federal court appoints a custodian to manage property subjected to the jurisdiction of the federal court, the federal court has exclusive jurisdiction to determine interests in such property. The custodian may be sued in another court only with respect to his acts or transactions in dealing with the property entrusted to him unless the federal court specifically withdraws its exclusive jurisdiction. This rule has developed from 28 U.S.C. § 959(a) and judicial interpretations. 28 U.S.C. § 959(a) provides: "Trustees, receivers or managers of any property . . . may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property . . ."

In *Odell* v. *H. Batterman Co.*, 223 F. 292, 297-98 (2nd Cir. 1915), the court stated:

> Where a court of competent jurisdiction, whether federal or state, takes property into its possession through a receiver appointed by it, the property is thereby withdrawn from the jurisdiction of all other courts.
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> * * *
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> So long, therefore, as the premises in controversy continue in the possession of the receivers appointed by the court below, the jurisdiction of that court as concerns the property is exclusive of the courts of the state of New York.

Also, in *Field* v. *Kansas City Refining Co.*, 9 F.2d 213 (8th Cir. 1925) the court followed the established rule under Section 66 of the Judicial Code (now 28 U.S.C. § 959) that the court which has jurisdiction of property has the ex-

clusive power to adjudicate all interests in that property to the exclusion of any other court. In *Field,* the appellant sought to litigate in another jurisdiction possessory actions to withdraw the property involved from the control of the receiver appointed by the federal court. The court stated that "this cannot be allowed without the permission of that [federal] court which, in the instant case, in the exercise of sound discretion, has been refused." 9 F.2d at 215. The court went on to point out that, pursuant to the statute, suits against receivers may be maintained in other courts and without the consent of the court with subject matter jurisdiction, but only to the extent that damages are sought against the receiver and not the possession of the property.

Cases are legion for the proposition that property entrusted to a custodian or receiver by a court is subject to the exclusive jurisdiction of that court, and no other court may adjudicate interests in the property without the express consent of the former court. *Harkin* v. *Brundage,* 276 U.S. 36 (1928); *Byers* v. *McAuley,* 149 U.S. 608 (1893); *Chillicottie Furniture Co.* v. *Revelle,* 14 F.2d 501 (8th Cir. 1926); *Scattengood* v. *American Pipe & Const. Co.,* 249 F. 23 (3d Cir. 1918); *American Brake Shoe & Foundary Co.* v. *Interborough Rapid Transit Co.,* 10 F. Supp. 512, 518 (S.D.N.Y. 1935), *aff'd,* 76 F.2d 1002 (2d Cir. 1935); *Equitable Trust Co. of New York* v. *Port Wentworth Terminal Corp.,* 281 F. 883 (D.C. Ga. 1922).

In this case, SAICI sought a state court determination of its ownership interest in the fund and Ginsberg sought a state court determination of his lien upon the fund. However, the fund was subject to the prior jurisdiction of the federal court and entrusted to Ginsberg for investment. The court orders of March 2, 1971 and March 18, 1971 forbade a transfer of the fund outside the jurisdiction of the federal court. Neither Ginsberg nor SAICI applied to the federal court for a release of its jurisdiction so as to submit the fund to the jurisdiction of the state court. However,

both had opportunity to do so. When the United States served SAICI with its amended complaint, SAICI moved in December, 1972 to set aside service of process (A. 88-89). That motion was denied by Judge Weinfeld on June 5, 1972 (A. 130-139). Neither SAICI nor Ginsberg requested Judge Weinfeld to withdraw federal jurisdiction over the fund. In fact, Judge Weinfeld's opinion states that SAICI would have to litigate its claim in the federal court notwithstanding state court proceedings. Judge Weinfeld pointed out that the fund was subject to federal court jurisdiction, that the United States was not a party to the state court action, and that SAICI would eventually have to face the claim of the United States. Thus, the exclusiveness of federal court jurisdiction was established. The proceedings in the state court and the judgments obtained were therefore void and entitled to no weight at all.

C. Because the Merits of the Tax Assessment Depended Upon Adriana Bosurgis' Ownership of the Securities Account, the State Court Had No Jurisdiction to Determine SAICI's Claim of Ownership:

In addition to the above principle that the state court factual determinations were void for lack of subject matter jurisdiction, such determinations were also void because the state court did not have jurisdiction to determine the issue presented to it. The issue presented to the state court, albeit an issue which the Bosurgis and SAICI did not contest, was whether the Bosurgis or SAICI owned the securities account and the $215,000 fund. The federal tax assessment was predicated upon the claim that Adriana Bosurgi and subsequently her two sons owned the securities account. Thus, the Bosurgis and SAICI sought to "litigate" a factual issue which governed the validity and merits of the tax assessment. However, state courts do not have the power, *i.e.*, jurisdiction, to determine issues which are dispositive of underlying tax claims. Thus, the state court did

not have jurisdiction to determine the merits of the uncontested factual issue presented by SAICI and the Bosurgis.

This rule has been comprehensively analyzed in *P.C. Monday Tea Co.* v. *Milwaukee Co. Expressway Comm.*, 66-1 U.S.T.C. ¶ 9306 (Sup. Ct. Wis. 1966). In that action, the Milwaukee County Expressway Commission brought a state court eminent domain proceeding to take certain real property owned by the P.S. Monday Tea Company. The United States intervened because of its claim against the corporation for unpaid federal withholding taxes. The United States also asserted that Robert W. Monday, who was affiliated with the corporation, was personally liable for the withholding taxes as a "responsible officer." He appeared and asserted various factual and legal reasons why he was not liable as a "responsible officer." The eminent domain proceeding resulted in an award of about $38,000. The United States and Mr. Monday agreed that, of the total award, $30,243.10 be distributed to him and the balance of $14,000 be retained by the state court pending resolution by the state court of the merits of the tax controversy. The issue presented to the state court was whether it had jurisdiction to hear the tax controversy even when it had jurisdiction over the fund and jurisdiction over the parties. It held that it did not.

The Wisconsin Supreme Court held that based upon the interrelationship of various federal tax policies, the state court did not have jurisdiction to examine the merits of the assessment against Mr. Monday. Just as a tax assessment was made against Mr. Monday, a tax assessment has been made against the Bosurgis. Such an administrative tax assessment has the force and effect of a judgment unless the taxpayer and the United States became involved in a plenary suit in the federal courts. *Bull* v. *United States*, 295 U.S. 247 (1935). If the taxpayer pays the full amount assessed and sues for a refund in the federal court as authorized by Section 7422 and 28 U.S.C. § 1346(a)(1), the

tax assessment is no longer deemed conclusively valid, but only presumptively valid. *Flora* v. *United States*, 362 U.S. 145 (1960). Also, if the United States sues in the federal court to recover judgment against the taxpayer and to foreclose on property as authorized by Section 7403, the tax assessment becomes only presumptively valid. *United States* v. *O'Conner*, 291 F.2d 520 (2nd Cir. 1961). As the Wisconsin court properly pointed out, no federal statute confers jurisdiction on the state courts to inquire into the merits of a tax assessment and such jurisdiction is granted only to the federal courts. In fact, the mandatory language of Section 7403 says that in actions brought to foreclose tax claims, all persons having any interest in the property *shall* be made parties, and the federal court *shall* adjudicate all claims asserted.

Although 28 U.S.C. § 2410 permits the United States to be named a party in a state court or federal court action having jurisdiction over the property to clear title, adjudicate lien priorities and remove the lien of the United States, 28 U.S.C. § 2410 cannot be used to adjudicate the underlying merits of a tax assessment. *Falik* v. *United States*, 343 F.2d 38 (2nd Cir. 1965). Thus a taxpayer may not use the indirect guise of a "2410" type of action to accomplish what can be accomplished only in a refund suit or a tax foreclosure suit. Unless the merits of the tax assessment are litigated in the appropriate federal court action, the tax assessment is deemed conclusively valid and the state courts have no jurisdiction to adjudicate the merits of the tax claim. For these reasons, the Wisconsin Supreme Court in *Monday Tea Co., supra,* held that the state courts had no jurisdiction to determine any of the merits of Mr. Monday's tax liability.

In the instant action, the tax assessments are predicated upon the Bosurgis' ownership of the securities account and the $215,000 fund. SAICI's state court action sought a determination that it, and not the Bosurgis, owned the

securities account and the $215,000. SAICI has admitted that the resolution of that factual issue would be dispositive of the tax claim (A. 390). Thus, SAICI knew that the purpose of its state court action was to defeat the tax claim. Inquiry into SAICI's claim of ownership constitutes inquiry into the merits of the tax assessment. Thus, such factual inquiry must be made by the federal courts because only the federal courts and not the state courts have jurisdiction to inquire into the merits of a tax assessment. Such issue could have been raised by the Bosurgis if they paid the amount of the assessment and sued for a refund. Such issue could be determined if the United States sued to foreclose its tax lien pursuant to Section 7403. In fact, the United States commenced such an action, and pursuant to Section 7403(b) joined SAICI as a party because of its claim of ownership.*

Both SAICI and the Bosurgis sought to have the state court make an uncontested factual determination as to an issue properly before the federal court which issue was dispositive of the merits of the tax assessment. The Bosurgis, as taxpayers, could not have brought a proceeding in the state or federal court to determine ownership of the property, unless they sued for a refund. *Falik*, *supra*. Essentially then, the Bosurgis, by purporting to admit to SAICI's claim in the state court action, were seeking to have the merits of the tax assessment determined, and such determination was outside the scope of state court jurisdiction and contrary to the policies set forth in *Falik*. Except in a federal court tax refund action or federal court tax fore-

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* Ginsberg was also joined as a party pursuant to Section 7403(b) because of his claim of lien priority. Although Ginsberg's claim could have been resolved in a state court pursuant to 28 U.S.C. § 2410, no action pursuant to 28 U.S.C. § 2410 was properly instituted because the United States was not named a party, the state court did not have jurisdiction over the fund, and the United States was not properly served. See Point V(C), *infra*.

closure action, the tax assessment has the effect of a judgment and is deemed conclusively valid. *Bull, supra.* For purposes of SAICI's state court action, it is conclusively presumed that Adriana Bosurgi owned the account. Thus, the state court had no jurisdiction to resolve the issue of SAICI's ownership.

POINT V

The State Court factual findings, even if not void, could not affect the United States' tax claim that the securities account belonged to Adriana Bosurgi.

A. The Appellate Division Held that Its Factual Determination Would Not Affect the Federal Tax Liens:

Mr. Justice Kapelman denied the uncontested motion by SAICI to recover the $215,000 fund and the uncontested motion by Ginsberg to be awarded a fee out of the fund. His opinion (A. 370-373) pointed out that SAICI merely sought an expeditious ruling on a conflicting claim, that the state court did not have jurisdiction of the fund, and that the United States was not a party. Both SAICI and Ginsberg appealed to the Appellate Division. The Appellate Division did not dispute the validity of the reasons given by Mr. Justice Kapelman for his ruling.

Instead, it ruled (A. 194) that because the Bosurgis conceded the authenticity of the documents submitted by SAICI, its uncontested motion to be declared owner of the funds should have been granted. Also, SAICI conceded that Ginsberg was entitled to a lien fee, and therefore his uncontested motion should have been granted. However, the Appellate Division recognized that its reversal of Mr. Justice Kapelman would have no effect upon the United States and the tax lien. It stated: ". . . the pending Federal actions and proceedings present [no] bar to the entry of

summary judgment . . . as the tax liens, if valid, are not affected."

The validity of the tax liens depended upon Adriana Bosurgis' ownership of the security account. Foreclosing the tax lien on the $215,000 fund depended upon how much of an attorney's fee was to be awarded to Ginsberg. The Appellate Division's ruling that the account belonged to SAICI and that Ginsberg was to be awarded a fee was inconsistent with the validity of the tax lien. However, the Appellate Division held that the tax liens were "not affected" by its factual determination. Thus, such factual determination have no effect upon the claim of the United States and no weight is to be accorded to such findings. If any weight is given to those findings, then the Appellate Division did affect the tax liens contrary to its express ruling.

B. The District Court's Ruling that the *Bosch* Case Required it to Give Considerable Weight to the Uncontested State Court Factual Finding Was Clearly Erroneous:

The Court below held that it was required by *Comm.* v. *Estate of Bosch*, 387 U.S. 456 (1967) to give "considerable weight" to the uncontested factual findings by the state court. In fact, by reason of the *Bosch* doctrine it was improper to give any weight to the state court factual findings and the Court below was required to make an independent factual finding of the merits of SAICI's claim and the proper amount of Ginsberg's lien.

Bosch involved the question of what effect a state court's legal characterization of property interests would have in a federal court tax proceeding involving that same property. The Supreme Court ruled, 387 U.S. at 457: "We hold that where the federal estate tax liability turns upon the character of a property interest held and transferred by the dece-

dent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." In reviewing the legislative history of the federal tax statute involved, the Supreme Court properly pointed out that "proper regard", but not finality, should be given to state court legal rulings, but only when made "in a *bona fide* adversary proceeding." 387 U.S. at 464. The Court further pointed out that a rule of law articulated by the state courts would be given finality only if such rule of law was made by the state's highest court.* The *Bosch* issue arises when parties to a state court action obtain a ruling of law in respect of undisputed facts and then seek to have that rule of law applied in a federal court action against a person who was not a party to the state court proceeding. *Bosch* held that so long as the state court proceeding was *bona fide*, the federal court could look to the state court decision for guidance. It held that the federal court was not bound by such decision, but should examine all relevant state court rulings to determine what the state law was. However, if the state court decision was a decision by the highest court of the state, there would be no question as to what the state law was, and therefore such decision was required to be followed.

Bosch did not involve the issue, presented here, of parties to a state court proceeding seeking to use a favorable uncontested *factual* finding to bind an absent party who in a federal court action does contest the factual determination made in the state court. When that situation does arise,

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* This aspect of the *Bosch* doctrine, of course, applies only if the state court had jurisdiction of the action. Before Judge Duffy could apply the *Bosch* doctrine of "proper regard", it was necessary for him to first determine whether the state court had jurisdiction over the *res*. We pointed out to the Court below that the proceedings before the state court were void, but Judge Duffy did not rule on that issue.

the federal courts uniformly hold that the state court factual findings are to be given no weight at all.*

In *Smith* v. *Comm*, slip op. 1655 (2nd Cir. 2/4/75) the local Surrogate's Court made a factual finding that $1,583,544.67 were the necessary expenses in administering the estate. The United States was not a party to the Surrogate's Court's proceeding. This factual finding was challenged by the Internal Revenue Service in computing the estate taxes due when the executor claimd a $1,583,544.67 expense deduction from the gross estate. In the subsequent Tax Court proceeding, $750,447.74 was allowed as the necessary expenses even though the legal test for determining necessary expenses was the same for tax and probate purposes. The Tax Court result was affirmed by this Court. In passing upon the effect of the Surrogate's factual finding, this Court stated: (slip op. 1660-62):

> . . . the [tax] interest of the federal government . . . will not always completely or accurately be reflected in a state's interest in supervising [probate matters]. In the present case, appellants' claims for administration expenses were not contested in the Surrogate's Court and there is some question as to whether

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* The distinction between a state court's resolution of *factual* issues and its resolution of *legal* issues is crucial. If the state court is asked to resolve factual issues which resolution governs the merits of a tax assessment, then the state court has no jurisdiction to resolve those facts. See Point IV(C), *supra*. If the facts are not disputed and the state court is asked to resolve solely the legal characterization of those facts, which was the *Bosch* situation, then the state court may determine what the state law is as to those facts. In the latter situation, the *Bosch* issue becomes to what extent is a federal court bound by a state court's view of its own law in respect of undisputed facts. Unless the pronouncement of law was by the state's highest court, *Bosch* holds that the federal courts are not bound. However, when legitimately disputed factual issues are resolved by a state court contrary to the tax claim of the United States, *Bosch* does not require such decision to be given even "proper regard."

> some of these expenses were in fact incurred for the benefit of the estate . . . rather than for the benefit of individual beneficiaries . . . In such circumstances, the federal courts cannot be precluded from reexamining a lower state court's allowance of administration expenses . . .
>
> Cf. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967) . . . [t]he Tax Court's determination . . . did not involve a refusal to follow New York law, but rather was the result of a *de novo* inquiry into the factual necessity for these expenditures.

Thus, when there is an underlying dispute as to the facts in a tax suit, a prior state court factual determination in which the United States was not a party will not bind the United States in the federal court or effect the federal court in making its *de novo* review. This is especially true when, as pointed out in *Smith*, *supra*, there is some legitimate factual question whether the state court reached the right result.*

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* *Smith*, *supra*, is consistent with the rule of law set forth in Point IV(C), *supra*, that a state court has no jurisdiction to adjudicate factual issues dispositive of the merits of a tax assessment. In *Smith*, there was no tax "assessment" but merely a "deficiency" determination of tax due which was litigated before the Tax Court. Section 6213(a) provides that, except with respect to a jeopardy assessment of a deficiency pursuant to Section 6861(a), no assessment of a deficiency and no proceeding to collect a deficiency may be begun until the taxpayer has had the opportunity to petition the Tax Court. Thus, in *Smith* the bar to state court resolution of factual issues relevant to a tax assessment was not present. However, the *Smith* case could have involved a jeopardy assessment pursuant to Section 6861(a) if ultimate collection of the tax were in jeopardy. In such case, the Surrogate's Court would have determined a factual issue relevant to an assessment. Such determination, however, was required to be made by the Surrogate's Court because of its exclusive jurisdiction of probate matters; whereas in SAICI's action, it presented a miscel-

[Footnote continued on following page]

A similar result was reached in *Cheng Yih-Chun* v. *Federal Reserve Bank of New York*, 442 F.2d 460 (2nd Cir. 1971). Plaintiff's father, a Chinese national, died leaving cash property in New York City. Plaintiff obtained from his father's foreign heirs a document purporting to release to plaintiff all the father's New York assets. Pursuant to federal regulations dealing with foreign nationals, such property could be impounded if distributable to persons other than plaintiff. The father's assets were made subject to the jurisdiction of the local Surrogate's Court, plaintiff petitioned the Surrogate's Court for payment of the funds pursuant to the purported release, the local public administrator opposed the petition, and the Surrogate's Court granted the petition. Plaintiff then sued the Federal Reserve Bank in the federal court to obtain a release of the funds. He did not prevail, and the federal court's factual holding was contrary to the findings of the Surrogate's Court. It was undisputed that the Surrogate's Court had valid *in rem* jurisdiction to pass upon plaintiff's claim,*

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laneous factual issue to a state court of general jurisdiction. When state courts are required by state statute to resolve certain factual issues (as with probate matters), *Smith, supra,* holds that such determinations will not bind the federal courts which, because of federal tax policy, have the obligation to make *de novo* tax determinations. *Smith, supra,* recognized that *required* state court determinations will not bind the United States as to tax issues. If the state court is not required to make a certain type of factual determination, then it has no jurisdiction to make a determination relevant to the merits of a tax assessment. The dissent in *Smith, supra,* is particularly instructive. Judge Mulligan did not urge that the Tax Court was bound by the Surrogate Court's determination by reason of some interpretation of *Bosch, supra.* Instead, he pointed out that the Internal Revenue Code provides that administration expenses allowed by a local probate court shall be allowable as federal estate tax deductions; and, therefore, the Tax Court was bound by the Surrogate's determination because *Lyeth* v. *Hoey,* 305 U.S. 188, 194 (1938) held that "state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."

* In this action, the state court had no *in rem* jurisdiction.

and plaintiff asserted that the Surrogate's Court's factual determination was binding in the federal court. However, both the District Court and this Court held that by virtue of *Bosch* an independent review of the law and facts was proper and that the federal court was only required to give "proper regard" to the Surrogate's decision and other state court rulings as to the applicable law. Thus, even when a state court has *in rem* jurisdiction of the property involved and even when the state court proceedings are truly adversary, the federal court must independently review the facts.*

Special considerations apply when the state court proceedings were collusive. In *Lakewood Plantation, Inc.* v. *United States*, 272 F. Supp. 290 (D.S. Car. 1967), an individual transferred his property to his corporation. This property was subsequently sold by the corporation, but the sales income was reported by the individual and not by the corporation. The Internal Revenue Service determined that the sales income was taxable to the corporation and not the individual. The individual then commenced a state court proceeding to reform the instrument by which he transferred his property to the corporation for the purpose of establishing that he remained the true owner at the time the subsequent corporate sales took place. The state court granted the relief sought. However, the state court proceedings were not adversary; and the parties before it, although formally hostile, sought the intended outcome. In the subsequent tax refund suit by the corporation, the corporation sought to use the factual findings by the state court as binding on the federal court. The federal court refused to admit the factual findings by the state court

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* In *Cheng*, the Surrogate's Court was apparently required by statute to entertain plaintiff's petition. Also, that action did not involve a tax assessment. Thus, the rule that state courts of general jurisdiction have no jurisdiction to resolve factual issues dispositive of the merits of a tax assessment was not involved.

into evidence. The court pointed out that prior to *Bosch* the law was that a state court determination would not affect a federal court proceeding if the state court action was collusive in the sense that the parties joined in the submission of the issues and sought a decision which would adversely affect an underlying tax claim. The court then pointed out that *Bosch* adopted a stronger test. Even if the state court proceeding was truly adversary and conducted without regard to an underlying tax claim, the federal court must make a wholly *independent* review of the facts and law. The court then concluded that because *Bosch* held that federal courts are not bound by erroneous state court findings of *law*, they cannot be bound by erroneous state court findings of *fact*. Thus, although it was clear that state court factual findings had no effect on the federal court because the state court action was collusive, by application of the more recent *Bosch* test such factual findings were equally without effect without regard to the question of collusion.

Based upon the above it is clear that the Court below erred in giving "considerable regard" to the uncontested state court factual findings. Not only did the Court below misinterpret *Bosch*, *supra*, but there can be little doubt that a sufficient showing of collusion was made to warrant a full inquiry into that issue before any regard was given to the state court proceedings. The undisputed elements of possible collusion are as follows: The federal court action was commenced first, and Ginsberg got himself appointed the federal custodian of the $215,000 being careful to point out that he had no authority to represent the Bosurgis (A. 30). The Bosurgis never appeared in the federal court. SAICI then commenced its state court action, and Ginsberg appeared for the Bosurgis denying, without qualification, (A. 409-410) the central allegations of SAICI's complaint (A. 393-398). SAICI then invited the United States to come into the state court or to litigate in any court with jurisdiction of the *res*. The Bosurgis then purportedly

flipped on the merits of SAICI's complaint (A. 430). SAICI moved for summary judgment (A. 374-375) which motion the Bosurgis did not contest and consented to (A. 460). If the Bosurgis were willing to concede SAICI's claim, they should have merely entered into a stipulation with it. The only purpose of "litigation" was to obtain an uncontested factual ruling *ex parte* the United States and then seek to bind the United States to it. While SAICI's uncontested motion was pending, the United States joined SAICI as a party in the federal court (A. 70-71). If SAICI was truly desirious to prove its claim in a forum which would bind the United States, presumably SAICI would welcome such joinder. SAICI objected, but Judge Weinfeld held (A. 130-139) that SAICI was a proper party in the federal court because the $215,000 fund was subject to the federal court's jurisdiction, the United States was not a party to SAICI's state court action, and SAICI would eventually have to face the claim of the United States. SAICI's uncontested state court motion was denied (A. 370-373) for virtually the same reasons that Judge Weinfeld held that SAICI was a proper party in the federal court. SAICI was not satisfied with having to litigate with the United States. It wanted an *ex parte* ruling that it owned the fund. SAICI appealed to the Appellate Division and prosecuted its appeal without serving the United States with its brief or the record (A. 349). The United States sought discovery from SAICI (A. 147), it objected, and Judge Duffy granted a stay (A. 198-199). After prevailing in the Appellate Division (A. 194), SAICI then moved for summary judgment in the federal court. The facts of SAICI's claim that it did not own the account are revealed in the United States' cross motion for summary judgment. SAICI's only position is that it is entitled to prevail because of its success before the Appellate Division. It appears that SAICI and the Bosurgis did all in their power to avoid confrontation of the merits with the United States and they used a state court action to further their goal.

In the event this action is remanded and in the event the issue of collusion is relevant, we will inquire into the following matters: First, how did SAICI learn about the federal court action which caused it to commence its state court action? Presumably Ginsberg and Chemical Bank did not tell SAICI because they professed no knowledge of SAICI until after its action was commenced. Did the Bosurgis tell SAICI about the federal court action? Presumably the Bosurgis knew about the federal court action because Ginsberg on March 18, 1971 (A. 30) represented that he believed that Messrs. Kostelanetz and Ritholz would appear in the federal action for the Bosurgis. If the Bosurgis told SAICI about the federal action, why did the Bosurgis tell Ginsberg to deny the essential allegations of SAICI's complaint? It is clear beyond doubt that the denials to that complaint were inconsistent with the Bosurgis' subsequent purported admission of the authenticity of the documents. Thus, the Bosurgis lied either when they gave Ginsberg information about the complaint or at their subsequent conference with him. Why did the Bosurgis lie? Why did Ginsberg represent in his affidavits that his August 12, 1971 conference was with both Bosurgis, whereas his prior September 14, 1971 letter stated that he conferred with just Leone? Why did Ginsberg represent in his affidavits that his August 12, 1971 conference with the Bosurgis was required because SAICI made a motion for summary judgment, whereas such motion was not made until two months later? Why did the Bosurgis not appear in the federal court action, but were willing litigants in SAICI's state court action if in fact there was an absolute defense to the tax claim that SAICI owned the securities account and the $215,000 fund? Why did the Bosurgis from 1954 through 1970 represent to Chemical Bank that they owned the account when they could have easily represented that SAICI really owned the account so that the proper amount of federal income taxes could have been paid? Why did SAICI resist litigating in the federal court? Why did SAICI prosecute an appeal to the Appellate Division with-

out serving the United States with its brief or the record when it was clear that SAICI's intent was to bind the United States? Finally, who owns SAICI?* The answers to these questions would shed light on the issue of whether SAICI's state court action was collusive.

C. The United States Cannot be Deemed a Party to The State Court Proceedings:

In the Court below SAICI took the position that even though the United States was not a formal party to the state court proceedings, nevertheless it should be deemed a party so that it would be bound by the state court proceedings. Judge Duffy held that the United States could not be deemed a party because it did not have the "laboring oar in the controversy". *Drummond* v. *United States*, 324 U.S. 316, 318 (1945). Judge Duffy was correct.

The sole involvement that the United States had with the state court proceedings were (1) attending a conference before Mr. Justice Kapelman on June 23, 1971 which conference was requested by Ginsberg to discuss his fee, (2) addressing three letters to the parties to the state court and Mr. Justice Kapelman dated October 28, 1971, November 12, 1971, and February 9, 1972 (A. 315, 318, 322), and (3) addressing a letter to the Appellate Division dated September 14, 1973 (A. 190) which letter was returned to the United States Attorney on September 18, 1973 (A. 193).** The law is clear that mere knowledge

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* The investigation by the Internal Revenue Service shows that SAICI's capital was $50,000, which is consistent with SAICI's financial statements [A. 304-310], and that SAICI's stock as of 1961 was owned as follows: Adriana Bosurgi, $20,000; Leone Bosurgi, $15,000; and Emilio Bosurgi, $15,000.

** These letters were written, not to participate in the state court proceedings, but to inform the state court parties that the state court was without jurisdiction and that they should litigate in the federal court because any decision in the state court would be without force and effect.

of a state court action, the participation as *amicus* in a state court action or even the right to intervene in a state court action does not make the United States a party to such action or otherwise bind the United States to the results had in the state court. *Brown* v. *Wright,* 137 F.2d 484 (4th Cir. 1943); *United States* v. *Leventhal,* 316 F.2d 341 (D.C. Cir. 1963); *United States* v. *Amos,* 287 F. Supp. 886 (D.C. Ill. 1968); and *United States* v. *Cohen,* 271 F. Supp. 709 (D.C. Fla. 1967). Thus, the United States cannot be deemed a party to the state court action.

A more fundamental reason why the United States could not be deemed a party was because none of the state court parties complied with 28 U.S.C. § 2410. 28 U.S.C. § 2410(a) provides that "for the protection of the United States" it may be "named a party" in any state or federal court action "having jurisdiction of the subject matter" to quiet title to . . . personal property on which the United States has . . . a lien." In actions brought in the state court to quiet title to property, which was the nature of SAICI's action, 28 U.S.C. § 2410(b) requires the pleading to "set forth with particularity the nature of the interest or lien of the United States" and requires service of that pleading on the local United States Attorney and the mailing of copies to the Attorney General. 28 U.S.C. § 2410 is a limited statutory waiver of the doctrine of sovereign immunity that the United States cannot be sued in any court to affect its rights without its consent. 28 U.S.C. § 2410 permits the United States to be sued in a state court in various foreclosure type actions the object of which actions is to extinguish and satisfy *all* liens and clear title to the property involved.*

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* Even in a properly commenced "2410" action, the court does not have jurisdiction to resolve the merits of the tax assessment. *Falik* v. *United States,* 343 F.2d 38 (2nd Cir. 1965). The purpose of such action is to resolve the priority of the United States' lien, not to resolve its merits.

However, none of the requisites of 28 U.S.C. § 2410 were satisfied, and thus doctrine of sovereign immunity prevented the United States from being affected by the state court action. The defects were as follows: First, the United States was not named a party. Second, the state court had no jurisdiction over the $215,000 fund. Third, SAICI's complaint did not set forth the interest of the United States to the $215,000 fund. Fourth, SAICI did not serve the United States with its pleading or mail a copy to the Attorney General. Thus, because none of the requisites of 28 U.S.C. § 2410 were satisfied, the United States is "protected" and immune from whatever proceedings were had in the state court. *United States* v. *Bluhm,* 414 F.2d 1240 (7th Cir. 1969).

CONCLUSION

For the reasons stated above it is respectfully submitted (A) that an order be entered (1) reversing the Court below and granting the United States' motion for summary judgment to dismiss the claim of SAICI, (b) reversing the Court below and reinstating the partial default judgment *in rem* against Leone and Emilio Bosurgi, (c) reversing the Court below and remanding Ginsberg's claim for further proceedings, (d) reversing the Court below and vacating the stay of discovery of Ginsberg, and (e) reversing the Court below, reinstating the amended complaint, and remanding the action for further proceedings against the other named defendants, or in the alternative (B) that an order be entered (1) reversing the Court below and remanding SAICI's claim, (2) reversing the Court below and vacating the stay of discovery of SAICI, and (c) granting the relief set forth in (b), (c), (d), and (e) of (A) above.

Dated: New York, New York
June 30, 1975.

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Plaintiff-Appellant.

DAVID [illegible]ND,
FREDERI[illegible] SCHAFFER,
Assista[illegible] United States Attorneys,
Of Counsel.

n 280 A-Affidavit of Service by Mail
. 3/72

AFFIDAVIT OF MAILING

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nty of New York) ss

PAULINE P. TROIA, being duly sworn,
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Walter G. Brannon

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Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977